

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FIVE BOROUGH BICYCLE CLUB, SHARON BLYTHE,
JOSH GOSCIAK, KENNETH T. JACKSON, MADELINE
NELSON, ELIZABETH SHURA, LUKE SON,

Plaintiffs,

-against-

07 Civ. 2448 (LAK)

THE CITY OF NEW YORK, RAYMOND KELLY, Police
Commissioner of the New York City Police Department,
JAMES TULLER, Commanding Officer, Patrol Borough
Manhattan South, Lt. John Doe, and Captain Jane Doe, New
York City Police Department, ,

Defendants.

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DECLARATION OF ROBIN BINDER

ROBIN BINDER, declares the truth of the following under penalty of perjury,
pursuant to 28 U.S.C. §1746:

1. I am an Assistant Corporation Counsel in the office of MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, attorney for defendants in this action. I submit this declaration in opposition to plaintiffs' motion for a preliminary injunction. More specifically, this declaration is submitted to describe the City's previous lawsuits involving the application of the parade permit requirement to bicycle processions, the genesis of the Police Department rule amendments challenged in this action, and the public nature of the rulemaking process.

2. New York City Administrative Code ("Admin. Code") § 10-110 provides that "a procession, parade or race shall be permitted upon any street or in any public place only after a written permit therefor has been obtained from the police commissioner" ("the parade permit

requirement”). The term “parade” is defined in regulations adopted by the Police Department to implement this statutory requirement and set forth in Chapter 19, Title 38 of the Rules of the City of New York (“RCNY”).

3. By amendments which were published in the City Record on January 26, 2007 and became effective on February 25, 2007, the Police Department amended the definition of “parade” so as to clarify the circumstances under which groups using City streets for purposes of assembly are required to obtain a permit. A copy of the rule amendments published in the City Record, together with a statement of their basis and purpose, is annexed as Exhibit A.

4. Under the amended definition, a parade is defined as “any procession or race which consists of a recognizable group of 50 or more pedestrians, vehicles, bicycles or other devices moved by human power, or ridden or herded animals proceeding together upon any public street or roadway.”

5. In this action, plaintiffs challenge the constitutionality of the amended rules as applied to bicycle groups and seek to permanently and preliminarily enjoin their enforcement against such groups.

6. Having apparently worked for almost two months on a lengthy set of supporting papers, plaintiffs now move on two days notice (with one day for opposing papers) for a preliminary injunction enjoining the enforcement of the parade permit requirement against the Critical Mass bicycle ride scheduled for Friday March 30, 2007 and other processions of more than 50 bicycles pending the determination of this action.

Prior Critical Mass Litigation

7. Prior to the recent rule amendments, a “parade or procession” was defined in the Police Department regulations as “any march, motorcade, caravan, promenade, foot or bicycle race, or similar event of any kind upon any street or roadway.”

8. Critical Mass bicycle rides have taken place in New York City on the last Friday of the month for a number of years, with numbers swelling in 2004 to the hundreds and even thousands. See Exhibit B (identified below) at 2-4. Although it is our position that bicycle processions were subject to the parade permit requirement even before the recent rule amendments, organizers and facilitators of the Critical Mass ride have steadfastly refused to apply for a permit so that the Police Department could maintain traffic safety along a prescribed route. Id. at 6-7.

9. In 2004, five individuals commenced an action in this Court entitled Bray, et. al. v. City of New York, et. al., 04 Civ. 8255, challenging the seizure by the Police Department of bicycles that had been left unattended on the city streets during the September 24, 2004 Critical Mass bicycle ride. Consequently, in its answer to the Bray complaint, the City interposed a counterclaim, and sought a preliminary injunction enjoining the Bray plaintiffs and all other participants in the Critical Mass bicycle rides from participating in the rides unless a parade permit was obtained from the Police Department. On or about October 28, 2004, Judge Pauley denied the City's motion on laches grounds. A copy of Judge Pauley's October 28, 2004 decision is attached hereto as Exhibit B.

10. Thereafter, the City made a motion to amend its counterclaim and against moved for a preliminary injunction in Bray. The Bray plaintiffs then cross-moved to dismiss the City's counterclaim. In late December 2004, Judge Pauley issued a decision declining to exercise supplemental jurisdiction over the City's counterclaim (which was based entirely on state law) and instead opined that the state court should decide whether participants in Critical Mass bicycle rides violate the City's parade permit requirement. A copy of Judge Pauley's December 23, 2004 decision is attached hereto as Exhibit C.

11. Consequently, the City then commenced an action in New York State Supreme Court, New York County, entitled City of New York v. Time's Up, Index No. 400891/05, to permanently enjoin the violation of the parade permit requirement by the named defendants and other participants in Critical Mass bicycle rides in New York City. The defendants in that action were a non-profit corporation known as Time's Up, which regularly advertises, encourages and promotes the New York City Critical Mass bicycle rides (see www.times-up.org), and key members of that organization including their Executive Director and media and legal liaisons.¹

12. At the outset of that action, the City moved for a preliminary injunction seeking inter alia to enjoin the Critical Mass rides absent the grant of a parade permit from the Police Department. By decision and order of Justice Michael Stallman dated February 14, 2006, a copy of which is annexed as Exhibit D, the motion was denied. Justice Stallman denied the City's motion, in part, because the definition of parade set forth in the Police Department regulations lacked descriptive and numerical criteria, stating that “[f]or many reasons, it would be sensible for [the City] to develop and promulgate criteria for what constitutes a parade or procession, as a function of its size.” In this regard, the court cited to American-Arab Anti-Discrimination Comm. v. City of Dearborn, 418 F.3d 600, 608 (6th Cir. 2005), in which the United States Court of Appeals for the Sixth Circuit invalidated a Dearborn, Michigan ordinance requiring permits for special events, because the definition of “special event” lacked numerical criteria.

¹ The Bray plaintiffs were not named as defendants in the state court action because there was no evidence that any of the Bray plaintiffs are regular participants in the monthly Critical Mass bicycle rides.

Adoption of the Rule Amendments

13. Accordingly, pursuant to the City Administrative Procedure Act (“CAPA”), set forth in New York City Charter § 1045, et seq., the Police Department sought to amend the definition of “parade” set forth in its rules so as to address Justice Stallman’s concerns.

14. On July 17, 2006, a Notice of Opportunity to Comment on Proposed Rule was published in the City Record together with the text of the proposed rule amendment. A copy of that notice is annexed as Exhibit E. The proposed rule set forth a new, three-pronged definition of the term “parade” by establishing numerical thresholds for groups of pedestrians, vehicles and bicycles proceeding together on any public street. The notice indicated that a public hearing on the proposed rule amendments would be held on August 23, 2006 and included instructions for submitting writing comments regarding the proposed rules.

15. In response to numerous public comments received even before the conduct of the public hearing, the Police Department withdrew its initial rule proposal prior to the hearing and modified that proposal. On October 18, 2006, a new Notice of Opportunity to Comment on Proposed Rule was published in the City Record together with the text of a modified rule amendment. A copy of that notice is annexed as Exhibit F. The modified two-pronged definition likewise defined the term “parade” by setting forth numerical thresholds for groups of pedestrians, vehicles and bicycles proceeding together on any public street. The notice indicated that a public hearing on the proposed rule amendments would be held on November 27, 2006 and included instructions for the submission of written comments.

16. At the public hearing conducted on November 27, 2006, numerous individuals spoke regarding the proposed rule amendments including Dan Lieberman, an Executive Board Member of plaintiff Five Borough Bicycle Club. Copies of portions of the public hearing transcript including his testimony are annexed as Exhibit G.

17. In response to public comments made at the public hearing and submitted in writing, the Police Department again modified the definition. By Notice of Adoption published in the City Record on January 26, 2007 (Exhibit A), the Police Department adopted rule amendments which define “parade” as “any procession or race which consists of a recognizable group of 50 or more pedestrians, vehicles, bicycles or other devices moved by human power, or ridden or herded animals proceeding together upon any public street or roadway.”

18. As required by CAPA, the Notice of Adoption included a Statement of Basis and Purpose setting forth the basis and purpose of the rule amendments. It states as follows:

The Police Department is charged with preserving the public peace and preserving order at assemblies that obstruct the free passage of public streets and sidewalks. In that connection, the Department is authorized to promulgate rules and regulations governing permits for processions, parades and races that occur on City streets and sidewalks. These amendments are intended to clarify the circumstances under which groups using City streets for purposes of assembly are required to obtain a permit. By clarifying the type of activity that constitutes a parade and is thus required to obtain a permit, these rules are designed to protect the health and safety of participants in group events on the public streets and members of the public who find themselves in the vicinity of these events.

Accordingly, in response to public comments received, the definition of parade is amended to include groups of 50 or more pedestrians, vehicles, bicycles or other devices moved by human power that proceed together on public streets.

Each of these types of activities has the likelihood to significantly disrupt vehicular and pedestrian traffic and adversely affect public health and safety, unless subject to regulatory control via the permitting process. The amendments to the rules will permit the Police Department to adequately preserve the public peace and prevent obstructions of public streets and sidewalks. ...

19. The adoption of the rule amendments received press coverage in local newspapers. For example, on Sunday, January 27, 2007, the New York Times ran an article under the headline "New Permits for Mass Bike Rides" noting in its lead sentence that "[t]he Police Department has adopted rules that require parade permits for bicyclists and others who take to the streets in groups of 50 or more for processions, races and protests." A copy of that article is annexed as Exhibit H.

20. As set forth in the Notice of Adoption and, pursuant to CAPA, the rule amendments became effective thirty days after their publication, on February 26, 2007.

21. In light of the foregoing, it is apparent that plaintiffs have been aware that the Police Department intended to adopt a rule clarifying the application of the parade permit requirement to bicycle processions since July 2006, and knew the precise terms of the amended rule since its publication on January 25, 2007. Indeed, the rule amendments had been in effect for four weeks when plaintiffs commenced the instant action.

Dated: New York, New York
 March 28, 2007



ROBIN BINDER (RB 5027)